amount which was alleged to have been misappropriated by the appellant. On this ground alone the appeal should be allowed.

It should, however, be pointed out that the date in the third charge was the 19th of August, 1961, and this was clearly subsequent to the visit of Mr. Murphy, the auditor, who on the 30th July, 1961, found that there was a balance in the store of 462½ lbs. of agropon. This evidence of Mr. Murphy could only lead to the conclusion that if there was in fact any misappropriation, the amount specified in the first two of the original charges had left a balance of 462½ lbs. I mention this part of the prosecution evidence to illustrate the nature of the confusion in the minds of those responsible for the prosecution which must have resulted in the appellant being placed in a position of not knowing what he was being charged with.

The learned President at the close of the prosecution case acting in pursuance of section 153(ii) of the Criminal Procedure Code amended the charges by framing a single charge alleging misappropriation of 2,500 lbs. of agropon between the dates mentioned in the first and that in the last of the three original charges. It was clear from one of the reasons given by the learned President that the prosecution had not proved that any particular quantity of agropon had been misappropriated on any of the dates mentioned in the three original charges. The learned President, however, was of the view that the gross amount of 2,500 lbs. of agropon had been misappropriated between 6th May, 1961, and 19th August, 1961. In view of Mr. Murphy's visit on the 30th July, 1961, it is difficult to understand how the learned President arrived at this conclusion. The appellant was called for his defence on the amended charge and it was not surprising from the evidence given in his defence that he was not in a position to say anything more than that he knew nothing about what had happened to the missing agropon. The conviction in this case was clearly founded on the evidence of the appellant's failure to account for the shortage. In a charge of criminal breach of trust mere failure to account is not sufficient evidence of misappropriation. It is necessary to examine from the surrounding circumstances and to be satisfied whether misappropriation can be inferred. In this case the learned President appeared to have drawn such inferences from the loss of the stock book and the failure of the appellant to report such loss to his superior officers. It was clearly in evidence that the stock book was on the table when the appellant was on leave. It was also in evidence that no one in the office at Batu Pahat seemed to have any knowledge what the stock book looked like. To draw inferences of guilt as the learned President had done in this case was in my view clearly unreasonable.

I accordingly quashed the conviction and ordered that the appellant be acquitted and discharged.

Appeal allowed.

CHUA CHEE CHOR v. CHUA KIM YONG & ORS.

[P. C. (Lord Morton of Henryton, Lord Keith of Avonholm and Lord Pearce) November 20, 1962]

[Privy Council Appeal No. 64 of 1960]

Practice and Procedure — Trial judge retiring without delivering judgment — Notes "taken and recorded" by trial judge — Parties requesting new judge to decide case — Whether suit is "continued" before another judge — Trengganu Civil Procedure Code, s.75.

Administration of Justice — Retirement of judge before delivering judgment — Undesirability of new judge basing judgment on materials recorded by trial judge — Request by parties to new judge to decide case on evidence recorded — Hardship to parties.

Question of fact — Dissentient judgment in Court of Appeal — Principles — Application.

This was an appeal from the decision of the Federation Court of Appeal ([1960] M.L.J. 127).

The plaintiffs (respondents in this appeal) are sons and widow of another son of one C. deceased and they claimed *inter alia* a bicycle shop in the defendant's (appellant's in this appeal) possession and 242 shares in the Trengganu Bus Co. Ltd. registered in the defendant's name as being part of the estate of the deceased. The defendant who is one of the sons of the deceased denied these claims. The trial before Abdul Hamid J. lasted for nine days after which the learned trial Judge reserved judgment and he later retired before delivering judgment. The case was then heard by Neal J. and both parties made application that Neal J. should decide the case on the evidence as recorded by Abdul Hamid J. who had taken a full note. Neal J. was also provided with copies of the exhibits and the previous submissions of counsel. Neal J. acting under section 75 of the Trengganu Civil Procedure Code held that as the bicycle shop and the shares were specified in the letters of administration to the estate of the deceased, they were the property of the deceased. He further decided as a fact that the shop and the shares were the property of the deceased. On appeal to the Court of Appeal it was held that Neal J. had erred in law in holding that the matter was decided by the letters of administration. The Court of Appeal further by a majority affirmed the finding of fact by Neal J. Before the Judicial Committee of the Privy Council it was contended that (a) Neal J. had no jurisdiction to act as he did because section 75 of the Code did not cover a case where there were no depositions and therefore no recording of the evidence save in the judges notes, and where a hearing was not being "continued" but had already been concluded save in so far as judgment remained to be delivered and (b) even if he had jurisdiction, the course which he adopted was contrary to the principles of justice and the judgment should be set aside and a new trial ordered.

Held: (1) the evidence in this case had been "taken and recorded by a judge" within the meaning of section 75 of the Trengganu Civil Procedure Code, which applied alike to civil and criminal cases, and, further, the hearing was being "continued" before Neal J., who in fact, heard further submissions by counsel;

(2) while the course adopted by Neal J. considered *in vacuo* was plainly undesirable and a precedent not to be followed, the circumstances were very unusual, and the material before the Judge, although a very insecure foundation for disputed questions of fact, was that on which the parties had asked to have the case decided, and its inadequacy affected each party alike;

(3) the procedure which the defendant had requested, and of which he had made no complaint in the courts below, could not be regarded as a denial of justice.

Cases referred to:—

(1) *Bolton* v. *Bolton* [1949] 2 All E.R. 908.

(2) *Coleshill* v. *Manchester Corporation* [1928] 1 K.B. 776.

(3) *Re British Reinforced Concrete Engineering Co. Ltd.'s Application* 45 T.L.R. 186.

(4) *Srimati Bidhabati Devi* v. *Kumar Ramendra Narayan Roy & Ors.* [1949] A.C. at p. 521.

PRIVY COUNCIL APPEAL heard *ex parte*.

F. Whitworth (*N. A. Marjoribanks* with him) for the appellant.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by, —

Lord Pearce: This is an appeal by the defendant from a judgment of the Court of Appeal in the Supreme Court of the Federation of Malaya upholding (in all respects material to this appeal) an order of Neal J. made in the High Court at Kuala Lumpur.

The plaintiffs on behalf of the estate of Chua Ah Chee alias Chua Kee Peng deceased made claims to property in the possession of the defendant. All the plaintiffs are sons of the deceased except the second plaintiff who is widow and administratrix of another son who died. The defendant also is a son of the deceased. The plaintiffs claimed *inter alia* that a bicycle shop in the possession of the defendant and 242 shares in the Trengganu Bus Company Ltd. registered in the defendant's name, are part of the estate of the deceased. The defendant denied the claims and asserted that he himself was the owner.

At the trial before Abdul Hamid J. 17 witnesses were called and submissions of counsel were made on nine days between the 6th October, 1954 and the 15th December, 1955. On the latter date the learned Judge reserved judgment. He afterwards retired without having delivered judgment. The case was then heard before Neal J. on the 2nd and 3rd June, 1958. Both parties made application that he should decide the case on the evidence as recorded by Abdul Hamid J. who had taken a full note. Neal J. was also provided with copies of the exhibits and of the previous submissions of counsel. He had however seen none of the witnesses. He fully recognised the undesirability of basing a judgment on such material and referred specifically to *Bolton* v. *Bolton* [1]. He realised that he was faced with a choice of two evils. He was clearly much influenced by the great hardship which would be caused to the parties if he insisted on a proper rehearing. He therefore decided in accordance with the wishes of the parties to act under section 75 of the Trengganu Civil Procedure Code. and to give judgment on the defective material which the parties offered to him. Section 75 provides as follows:—

"Where evidence in any suit has been taken and recorded by a Judge or Magistrate and a postponement has become necessary the further hearing of such suit shall only be continued before the same Judge or Magistrate; Provided that if such Judge or Magistrate is unable to sit by reason of leave, sickness or transfer the further hearing of the suit may be continued before another Judge or Magistrate.

A Judge or Magistrate continuing the hearing of a suit as provided above may adopt the evidence taken by his predecessor and proceed with the suit from the stage at which his predecessor left it, or may recall the witnesses and hear the suit."

The learned Judge then decided that since (*inter alia*) the bicycle shop and the shares were specified in the letters of administration to the estate of the deceased, he was bound thereby to hold that they were the property of the deceased. But in case he was wrong in law in so holding he went on to decide as a fact that the shop and the shares in the Trengganu Bus Company Ltd. were the property of the deceased.

The Court of Appeal rightly held that the learned Judge had erred in law in thinking that the matter was decided by the letters of administration. By a majority however it came to the same conclusion of fact as had the learned Judge. Thomson C.J. (with whom Smith J. agreed) felt grave doubts as to the regularity of the unusual course taken by the Judge in acceding to the parties request that he should "give judgment on evidence as recorded by his predecessor". After referring to the English cases of *Bolton* v. *Bolton, Coleshill* v. *Manchester Corporation* [2] and *Re British Reinforced Concrete Engineering Co. Ltd.'s Application* [3], the learned Chief Justice concluded:—

"Before us neither party has taken the point of irregularity and in the circumstances for myself I am not disposed to take the point although I would express my very strong view that the precedent is not one to be followed."

On appeal to your Lordships' board the defendant now seeks to argue first that Neal J. had no jurisdiction to act as he did, and secondly, that even if he had jurisdiction, the course which he adopted (albeit at the parties' request) was so contrary to the principles of justice that the judgment should be set aside and a new trial ordered.

The first argument is founded on the words of section 75. It is contended that they cannot cover a case where (as here) there were no depositions and therefore no recording of the evidence save in the Judge's notes, and where a hearing was not being "continued" but had already been concluded save in so far as judgment remained to be delivered.

In their Lordships' opinion, however, the evidence in this case had been "taken and recorded by a Judge" within the meaning of the section. They cannot accept the contention that a Judge's notes cannot suffice to satisfy the section. The words are, at the least, as apt to include a Judge's notes as a shorthand transcript. If, therefore, the defendant's contention were correct, the section could only apply to criminal cases where formal depositions are made. The whole tenor of the section seems to their Lordships to denote an intention that it should apply to civil and criminal cases alike. Nor can their Lordships accept the argument that because counsels' speeches were concluded before Abdul Hamid J., the suit could not be "continued" before Neal J. In fact he heard further submissions by counsel on the question whether he was bound by the fact that the items in dispute were listed in the letters of administration as being the property of the deceased.

As to the second argument, their Lordships would adopt the observations of the learned Chief Justice quoted above. The course adopted by Neal J., considered *in vacuo*, was plainly undesirable. But the circumstances were very unusual. A rehearing of oral evidence would have entailed even further delay and great expense. Some of the many witnesses were several hundreds of miles away. The learned Judge had before him a full note of the sworn evidence of witnesses who had been examined and cross-examined. It was a very insecure foundation for disputed questions of fact. Nevertheless it was the material on which the parties, in the unhappy state of affairs, asked to have their case decided, and its inadequacy affected each party alike. The defendant sought the hazard and, having lost, complains of it. Their Lordships cannot now regard as a denial of justice the procedure which the defendant himself (together with the plaintiffs) requested and of which he has made no complaint in the Courts below.

The defendant has further contended that the evidence did not support the conclusions of Neal J. and the Court of Appeal, and in particular that the plaintiffs failed to satisfy the onus of proof laid upon them by section 110 of the Evidence Ordinance which provides that "when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner". The defendant relies on the judgment of Ong J. who after a careful analysis of the evidence, thought that the statutory onus was not discharged and gave a dissenting judgment in the Court of Appeal. Their Lordships however find no justification for investigating the question of fact. The principles applied by the Board where there are concurrent findings of fact have been clearly enunciated in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy & Ors.* (4). The fact that there was a dissentient in the Court of Appeal, does not affect the matter (*ibidem*). Those principles are not inflexible and their Lordships' Board may in special circumstances vary their application in some degree. In the present case, however, there are no circumstances that justify any departure from their strict application.

Their Lordships will therefore report to the Head of the Federation of Malaya that in their opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Bulcraig & Davis.*

T.U.V. v. COMPTROLLER OF INCOME TAX

[A. C. J. (Rose C.J.) November 29, 1962]

[Singapore — District Court Appeal No. 34 of 1960]

Income Tax — Returns — Taxpayer not delivering — Comptroller making assessment under s.72(3), Income Tax Ordinance — Taxpayer not practising any trade or profession — Profit from successful bets — Inference that taxpayer was paid runner or agent for bookmakers — Income Tax Ordinance (Cap. 166), ss.72(2)(b), (3) and 80(3).

This was an appeal against a decision from the Board of Review, holding that the appellant had failed to satisfy the onus which was upon him of proving that certain assessments made by the Comptroller under section 72(3) of the Income Tax Ordinance were excessive. The appellant had never previously made a return and had never practised any trade or profession which could have given rise to a chargeable income. He had no house of his own but lived with his wife in his parents-in-law's house. Further there was no evidence of any extravagance in his way of life. It was common ground that he was in the habit of placing bets with bookmakers on behalf of two wealthy men and it was his contention that during the years in question he persistently backed horses and from time to time was successful in his bets.

It was suggested for the Comptroller that the reasonable inference from these facts was that the appellant was a runner or agent for bookmakers and that therefore it must be presumed that he was obtaining some payment from the bookmakers with whom he placed the bets.

Held: the appellant had discharged the onus which was upon him, in that, there was no sufficient evidence that in the relevant years he was in receipt of a chargeable income.

DISTRICT COURT APPEAL.

Denis Murphy for the appellant.

R. M. Berriman for the respondent.

Cur. Adv. Vult.

Rose C.J.: This is an appeal against a decision from the Board of Review, holding that the appellant had failed to satisfy the onus which was upon him of proving that certain assessments made by the Comptroller of Income Tax were excessive.

The assessments in question were made under section 72(3) of the Income Tax Ordinance (Cap. 166) whereby the Comptroller is empowered where the person has not delivered a return, to determine the amount of chargeable income of such person and make assessments accordingly.

The great majority of such cases relate to persons who have an admitted trade or profession and have either failed to make a return at all, or have made a return which the Comptroller regards as disclosing too low an income, a matter which can be dealt with under section 72(2)(b) of the Ordinance. In such cases the taxpayer, if dissatisfied with the assessment, must adduce figures and evidence in support of his position and in the event of his failing to discharge the onus which is placed upon him by section 80(3) of the Ordinance, the Comptroller's assessment is affirmed.

The present case is unusual in that the appellant had never previously made a return and had never, according to his own evidence,